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91-1884

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CESAR AND ROSARIO TANGONAN,

Claimant-Petitioners,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the release of the res in an in rem forfeiture proceeding destroys the jurisdiction of the court, as held by the Seventh, Ninth and Eleventh Circuits, or whether jurisdiction is retained by virtue of the United States filing the suit, thereby submitting to the in personam jurisdiction of the court, or because no policy rationale supports the need for a stay order, both as held by the First, Second, Fourth, and Eighth Circuits.

2. Whether the decision of the Ninth Circuit in the instant case, and as published in United States v. $29,959 U.S. Currency, 931 F.2d 549 (9th Cir. 1991), is contrary to:

(a) The holding of The Rio Grande, 90 U.S. (23 Wall.) 458 (1874), and;

(b) The case law of the Courts of Appeal for the Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits that continue to follow the rule enunciated in The Rio Grande.

3. Whether an appeal can be "moot" as a result of an improper release of the res by the United States when issues remain that would render all prior orders "null and void" because:

(a) The United States never obtained jurisdiction over the property in the first instance;

(b) The actions of the United States in attempting to obtain in rem jurisdiction violated the due process clause of the Fifth Amendment; and

(c) The accumulated actions of the United States and the utilization of "archaic" in rem procedures violate the Fifth Amendment to the United States Constitution.

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THE OPINIONS BELOW

The opinion of the United States District Court for the Southern District of California staying the arrest of the real property is reproduced as Appendix A. The opinion of district court denying motions for summary judgment, expungement of lis pendens and sanctions is reproduced as Appendix B. The order of the district court regarding the substitution of the res is reproduced as Appendix C. The opinion of the district court granting summary adjudication of issues is reproduced as Appendix D. The opinion of the district court granting summary judgment and granting in part and denying in part the motion for rehearing is reproduced as Appendix E. The opinion of the Ninth Circuit Court of Appeals

dismissing the appeal is reproduced as Appendix F.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was issued by the Ninth Circuit on March 17, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), which provides for the review by certiorari of judgments rendered by a circuit court of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U.S.C. § 881(a)(6) provides:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

* * *

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Rule 62(a) of the Federal Rules of Civil Procedure, provides:

Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be

taken until the expiration of 10 days after its entry.

STATEMENT OF THE CASE

Both the facts of the underlying case and the actions of the United States before the Ninth Circuit are relevant in resolving the Questions Presented.

1. THE UNDERLYING CASE

On July 23, 1986, Eden Rios and Elvia Soto purchased residential property located at 12388 Avenida Consentido, Rancho Bernardo, California ("the property"). On July 11, 1988, Rios quitclaimed his interest in the property to Soto. On July 26, 1988, Cesar and Rosario Tangonan entered into escrow for the purchase of the property from Soto. On July 31, 1988, Soto signed the deed and turned it over to the escrow agent. On August 22, 1988, the instant action was filed in the United States District

Court for the Southern District of California. In essence, the United States claimed that Rios was a drug dealer and that he purchased the property with proceeds from illegal drug transactions. The action sought seizure and forfeiture of the property.

On September 1, 1988, a warrant was issued for arrest in the action in rem, directing the U.S. Marshal to attach the property, and thereby perfect the court's jurisdiction. On September 23, 1988, the United States sought and received a Writ of Entry, and four days later, on September 27, 1988, escrow closed on the property. Soto received $137,236.92 and the Tangonans received the house. The Tangonans then moved into their new home on the same day.

On October 5, 1988, at approximately 9:00 a.m., the U.S. Marshal attempted to arrest the property but was unable to effectuate the arrest because the property had been sold to the Tangonans. The warrant was returned to the court.

On January 12, 1989, the United states recorded a Withdrawal of its first Lis Pendens, previously dated August 22, 1988. On February 10, 1989, the United States filed a second Lis Pendens on the property. On June 20, 1989, pursuant to stipulation and court order, the Tangonans substituted $137,000 in cash, in lieu of their home, as the res. Multiple motions for summary judgment and summary adjudication of issues were filed by all parties, and judgment was eventually entered in favor of the United States.

It is undisputed that the Tangonans had no actual knowledge that Rios or Soto were drug dealers or that the property had been purchased with drug money.

2. POST-JUDGMENT ACTIVITY

The facts of relevance to the Ninth Circuit's decision to dismiss the appeal, relate to the timing of certain actions by the government:

Judgment entered	June 17, 1991
Notice of Appeal filed	June 20, 1991
Money Ordered Transferred by U.S. Attorney	June 21, 1991
Money Transferred by Marshal	June 24, 1991
Expiration of the Rule 62(a) Automatic Stay	June 28, 1991
Tangonan's Brief Due and filed Before the Ninth Circuit	January 28, 1992
Money Disbursed to Cities	January 28, 1992

The timing of the government's action suggests bad faith, both in terms of doing acts to destroy the jurisdiction of the court, and also waiting seven (7) months to disburse the money after or at the same time the Tangonans filed their brief. The only rationale for the disbursement was to attempt to destroy the jurisdiction of the court.

It is important to note that the government has never executed on the judgement, rather an Assistant United States Attorney sent a letter directing that the monies be transferred. Out of an abundance of caution the Tangonan's filed an Motion for a Stay of Execution with the Ninth Circuit on March 13, 1992 - four days before the appeal was dismissed. The Ninth Circuit never acted on the Motion.

REASONS FOR GRANTING THE WRIT
SUMMARY

The Tangonan's present three questions for consideration. The first question presents an issue wherein four circuit courts of appeal have held that the release of the res in a case filed in rem does not defeat the jurisdiction of the court, because the act of the government in filing the suit submits the government to the in personam jurisdiction of the court. See e.g., United States v. One Lot of $25,721 in Currency, 938 F.2d 1417 (1st Cir. 1991); United States v. Aiello, 912 F.2d 4 (2d Cir. 1990); United States v. $95,945.18 United States Currency, 913 F.2d 1106

(4th Cir. 1990); and United States v. $12,390, 956 F.2d 801 (8th Cir. 1992).[1]

Contrast the decision of three other circuits that have steadfastly declined to adopt this standard and have held that the release of the res destroys jurisdiction. See e.g., United States v. Tit's Cocktail Lounge, (7th Cir. 1989); United States v. One Lear Jet, 836 F.2d 1571 (11th Cir. 1988), (6-5 en banc decision); United States v. U.S. Currency in the Amount of $110,000.00, 735 F.2d 326 (9th Cir. 1984).

Interestingly, the Fifth Circuit seems to go both ways. Compare United States v. $79,000 in U.S. Currency, 801

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[1] These circuits often have additional cases with similar holdings but for purposes of argument we merely present one case from that circuit, See e.g. United States v. Borromeo, 945 F.2d 750, 752 (4th Cir. 1991).

F.2d 738 (5th Cir. 1986)(res released equals no jurisdiction) with United States v. An Article of Drug Consisting of 4680 Pails, 725 F.2d 976 (5th Cir. 1984) (res released but in personam jurisdiction exercised).[2]

Given this confusion among the circuits, and the divisive nature of the split, this court should grant certiorari to resolve this question.

A second question relates to the Ninth Circuit's recent departure from established precedent of this Court as set forth in The Rio Grande, 90 U.S. (23 Wall.) 458 (1874). The Ninth Circuit changed the rule "that an accidental,

[2] See also Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978); and Inland Credit Corporation v. M/T Bow Egret, 552 F.2d 1148 (5th Cir. 1977).

fraudulent or improper removal" of the res from the custody of the court does not destroy the jurisdiction. Id. at 465. The Ninth Circuit now requires that the "accident," "fraudulent," or "improper" removal has to prevent the party from asking for a stay. Inasmuch as the federal government took the res in this case in violation of the automatic stay of Rule 62(a) of the Federal Rules of Civil Procedure, and in petitioner's belief, in violation of the "substitution of res" order entered by the district court, we fail to see why yet another stay would make any difference. Regardless, the Ninth Circuit's alteration of the rule of The Rio Grande now makes its law inconsistent with multiple other circuits that continue to follow the rule annunciated by this Court

in The Rio Grande. By order of the circuit, See e.g., United States v. Aiello, 912 F.2d 4 (2rd Cir. 1990); United States v. $95,945.18, (4th Cir. 1990); United States v. $79,000, 801 F.2d 738 (5th Cir. 1986); United States v. One 1976 Rolls-Royce Corniche Convertible, 770 F.2d 713 (7th Cir. 1985); United States v. $12,390, 956 F.2d 801 (8th Cir. 1992); and United States v. Four Parcels of Real Property in Green and Tuscaloosa Counties in the State of Alabama, 941 F.2d 1428 (11th Cir. 1991).

The decision of the Eighth circuit in $12,390 is in direct conflict. It seems the government in $12,390 likewise took the money in violation of the automatic stay contained in Rule 62(a). The Eighth Circuit held the transfer and sharing of the money with the St. Louis police to be

improper, and thereby retained jurisdiction.

The deviation from this court's established precedent, and the inconsistency between the Ninth Circuit and the Second, Third, Fourth, Fifth, Seventh, Eighth and Eleventh circuits warrants intervention by this court.

On the third question, three subquestions are presented. All three subquestions ask whether a determination that all orders could be null and void ab initio requires the circuit court to entertain these issues on appeal, in a similar vein to the doctrine of "jurisdiction to determine jurisdiction." If the lower courts had no "authority" to seize or sell the property or substitute res, because of jurisdictional defects or unconstitutionality of actions taken by

the government, then we have a "taking" by the government "without just compensation" in violation of the Fifth Amendment. Is a new lawsuit necessary to make that determination, or do principles of judicial economy mandate the issues be heard in one action. Quite frankly, the third component of the third question asks, as suggested in Continental Grain Co. v. Barge FBL-585, 364 U.S. 19, 23 (1960) whether in rem jurisdiction, in certain circumstances, has outlived its usefulness - in the light of International Shoe and its progeny - and may in fact be unconstitutional under the due process clause of the Fifth Amendment of the United States Constitution. See e.g. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-690 (1973)

(suggesting forfeitures could be unconstitutional in some circumstances).

Finally, Judge Learned Hand once said:

> If we are to keep our democracy, there must be one commandment: thou shall not ration justice.

Hand, Learned, 'Thou Shalt Not Ration Justice', 9 Brief Case No.4, pp. 3,5 (1951).

The Ninth Circuit has rationed justice and the Tangonan's have been denied their day in court.

1. THE TRANSFER OF THE RES BY THE PLAINTIFF SHOULD NOT DESTROY THE JURISDICTION OF THE COURT.

   A. BY FILING SUIT THE GOVERNMENT VOLUNTARILY SUBMITS ITSELF TO THE IN PERSONAM JURISDICTION OF THE COURT.

The First, Second, Fourth and Eighth Circuits all relied upon the well reasoned and rational dissent of One Lear Jet. The policy rationale was best

summed up by the lower courts, we quote from the Fourth Circuit:

> We also agree with the dissenters in One Lear Jet that by initiating the forfeiture proceeding in the district court, the government has subjected itself to this court's in personam jurisdiction. Having submitted itself to the jurisdiction of the district court, the government should not be allowed to escape "through its subsequent jurisdictional exceptions" to the claimant's appeal.

$95,945.18 U.S. Currency, 913 F.2d at 1109 (footnotes omitted).

The proposition that filing a lawsuit voluntarily submits a plaintiff to the jurisdiction of a court is not novel or new, and it finds support in the case law of this Court:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence.

Adam v. Saenger, 303 U.S. 59, 67-68 (1938).

Petitioners believe a point made by the late Judge Vance in his well reasoned dissent in One Lear Jet aptly draws the distinction which the Ninth, Seventh and Eleventh Circuits fail to grasp:

> The issue in the case however, is not what kind of jurisdiction exists over the defendant owner of the res, but what kind of jurisdiction exists over the plaintiff United States.

One Lear Jet, 836 F.2d at 1580 (Vance, J., dissenting).

The decision of the First, Second, Fourth and Eighth Circuits are more just, better reasoned, and petitioners would urge this Court to grant certiorari and adopt that standard.[3]

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[3] By way of observation, petitioners would note that the Third Circuit Court of Appeals has exercised jurisdiction in the same circumstances as present here, and its decision is likewise inconsistent with the Seventh,

B. THE "NO RES NO JURISDICTION" RULE URGED BY THE GOVERNMENT HAS NO VALID POLICY RATIONALE IN NON-MOVING ASSET CASES.

In addition to the voluntary submission to jurisdiction by the government, there exists no policy reason to support the "lose the res lose the jurisdiction" rule followed by the Ninth, Seventh, and Eleventh Circuits. The ancient policy rationale that supported the "lose the res" rule just does not apply to non-movable assets or cash deposits controlled by the U.S. Marshal. The purpose of retaining the res was to provide for an asset to fund a judgment. When that asset is lost, then the potential for payment becomes zero therefore the need to protect the res is

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Ninth and Eleventh Circuits. See United States v. $1,322,242.58, 938 F.2d 433 (3rd Cir. 1991).

critical. Again, to quote the Fourth Circuit:

> We conclude that invocation of the in rem rule is particularly inapposite to defeat jurisdiction in a government-initiated civil forfeiture action. As noted by Judge Vance in One Lear Jet, "[f]orfeiture actions are unique in that they are the only proceedings where the government may confiscate private property on a mere showing of probable cause... to [then] eliminate the right of appeal, the most important safeguard against abuse, is indeed a drastic step." 836 F.2d at 1578 (Vance, J., dissenting). Unlike the typical case where the defendant ship stealthily absconds from port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing. Because the res is unlikely to disappear, we see no reason to require the claimant to file a stay of execution or a supersedeas bond in a valid forfeiture action, because such bonds are typically filed to protect the interests of the party that prevailed in the district court. Having prevailed below, the government, if it wins on appeal, is assured of execution regardless of whether Baxter files a bond or stays execution of the judgment.

$95,945.18 U. S. Currency, 913 F.2d at 1109 (footnotes omitted).

In the instant case the government was fully protected by the posting of $137,000 by the claimants. There is no need to keep the ship from sailing. the entire concept of in rem jurisdiction is a fiction. Justice Black delivering the opinion of the Court noted:

> The fiction relied upon has not been without its critics even in the field it was designed to serve. It has been referred to a "archaic," "an animistic survival from remote times," "irrational" and "atavistic."

Continental Grain Co., 364 U.S. at 23.

The government has turned what was meant to be shield into a sword that mocks due process of law. This should not be allowed.

2. THE RULE OF THE RIO GRANDE SHOULD BE RESTORED AS THE LAW IN THE NINTH CIRCUIT.

> We hold the rule to be that a valid seizure and actual control of the res by the Marshal gives jurisdiction of the subject matter and that an accidental or fraudulent or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction.

The Rio Grande, 90 U.S. (23 Wall.) 458, 465 (1874).

This venerable old rule has been the law of the land since 1874 and has been followed by every circuit to have occasion to address the issue - until now. The Ninth Circuit initially announced its departure in U.S. v. $29,959 in U.S. Currency, 931 F.2d 549, 552 (9th Cir. 1991), and followed the change in the instant case. In assessing this rule, and as a general backdrop for the entire case, it should be remembered:

> Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.

United States v. One Ford Coach, 307 U.S. 219, 226 (1939).

The Ninth Circuit has made it even more difficult for innocent owners, like the Tangonan's, to even get their day in court.

The government transferred the money: in violation of the stay contained in Rule 62(a) of the Federal Rules of Civil Procedure; in petitioner's belief, in violation of the "substitution of res" order of the district court; and in bad faith. Why should we believe another order would deter their conduct.[4]

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[4] In The Rio Grande the court indicated that delivery of the res upon posting of security does not destroy the jurisdiction. That is what occurred in this case, so perhaps that is the simple answer.

The exact same type of factual pattern occurred in the Eighth Circuit, and the $12,390 case found the transfer in violation of Rule 62(a) to be improper and proceeded to exercise jurisdiction. 956 F.2d at 805.

The petitioner's urge this Court to grant certiorari to restore the rule of The Rio Grande as the law of the Ninth Circuit and to resolve the conflict the Ninth Circuit now has on this issue with the Second, Third, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits.

3. BECAUSE ISSUES EXIST WHICH COULD RENDER ALL PRIOR ORDERS NULL AND VOID, THE CASE IS NOT MOOT.

On this last question presented, the petitioner's argue important constitutional and jurisdictional issues which could best be settled by this Court.

A. THE TANGONAN'S CHALLENGE OF THE SUBJECT MATTER JURISDICTION OF THE DISTRICT COURT IS NOT MOOT.

> It is well settled that a judgment is void "if the court that considered it lacked jurisdiction of the subject matter, or if the parties or if [the court] acted in a manner inconsistent with due process of law."

Watts v. Pinckney, 752 F.2d 406, 409 (9th Cir. 1985) (emphasis and parenthetical in the original); See e.g. American Insurance Co. v. 356 Bails of Cotton, 26 U.S. 511 (1828).

Moreover, "[A] void judgment is a legal nullity...." Id. at 410.

If this Court accepts this jurisdictional argument, then all orders of the district court are null and void, and the act of the United States government in taking the money is nothing

short of conversion.[5] If the order is void and a nullity, then the United States has no legal grounds to take the money. A court always retains jurisdiction to determine jurisdiction over the subject matter or the parties. See Ilan-Gat Engineers, Ltd. A.G./S.A. v. Anitgua Intern Bank, 659 F.2d 234, 239 (D.C.Cir. 1981) Cf. Untied States v. United Mine Workers, 330 U.S. 258 (1947).[6]

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[5] The United States knew this jurisdictional issue was before the Ninth Circuit when it acted. At the very least, the Ninth Circuit should hear the appeal to decide this issue.

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[6] In an opinion withdrawn two years later, the Ninth Circuit similarly held. See Stevedoring Services of America v. Ancora Transport N.V., 941 F.2d 1378, 1380 (9th Cir. 1989).

B. CONSTITUTIONAL ISSUES RAISED BELOW ARE NOT MOOT.

If the United States government or the lower court acted in a manner inconsistent with due process, then the subject orders are void and a nullity. See World-wide Volkswagen v. Woodson, 444 U.S. 286, 291 (1980); and Pennoyer v. Neff, 95 U.S. 714, 732-733 (1878).

Argument B2 of the Tangonan's brief in chief filed with the Ninth Circuit is a direct due process challenge to the standard applied by the district court. A district court in Florida, on facts nearly identical to the case at bar, has found the government's acts inconsistent with the due process clause. USA v. One Parcel of Real Estate, 715 F.Supp. 360, 363 (S.D. Fla. 1989). This Court has suggested that seizures could, under certain circumstances, violate the due

process clause. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689-690 (1973). The Eleventh Circuit has invoked the due process clause to limit the reach of the same statutory scheme utilized by the federal government in this case. See United States v. One Single Family Residence, 933 F.2d 976, 982 (11th Cir. 1991).

The actions of the United States in taking the money to defeat an appeal, strengthens the due process argument and raises the question of whether there has now been a taking without just compensation. Because these constitutional violations would render the lower court order void and a nullity, then these issues remained before the Ninth Circuit and are not moot.

C. THE CUMULATIVE ACTIONS OF THE GOVERNMENT VIOLATE TRADITIONAL NOTIONS OF FAIR PLAY AND THE FIFTH AMENDMENT.

> [T]raditional notions of fair play and substantial justice can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage

Shaffer v. Heitner, 433 U.S. 186, 212 (1976) (applying a due process analysis to an in rem proceeding).

Moreover, this Court in Calero-Toledo v. Pearson Yacht Leasing Co., left the door open to declaring forfeitures unconstitutional, under the right circumstances:

> It therefore has been impled that it would be difficult to reject the constitutional claim of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance, it would be difficult

> to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689- 690 (1973) (emphasis added).

In reviewing pre-trial seizures of property by private parties this Court said:

> The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - to minimize substantively unfair or mistaken deprivation of property. So viewed, the prohibition against the deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference.

Fuentes v. Shevin, 407 U.S. 67, 80-81 (1972).

In the instant case it is undisputed that the Tangonan's are honest hardworking American citizens and taxpayers whose only mistake was to buy a house from a drug dealer. The Tangonans had no actual knowledge that they were purchasing from a drug dealer or that the seller had purchased the house with drug money. After being placed in custody by the DEA for nearly an hour, during the first attempted arrest of the property, they were released. The substituted res was finally found by the district court to be property of the federal government based upon a mere showing of probable cause and, despite the fact the Tangonan's had no actual knowledge of any illegality. When the lower court refused to consider the innocent owner defense, because of a lis pendens that the

Tangonans knew nothing of, they asked the Ninth Circuit Court of Appeals to give them their day in court. The government then illegally took the money and used that as a basis to ask the Ninth Circuit to dismiss the appeal. Based upon this act of "conversion" and based upon "archaic" rules of jurisdiction, the Ninth Circuit Court of Appeals dismissed the appeal in a two sentence opinion. The cumulative actions of the government, and the acquiescence of the lower courts, have denied the Tangonan's any modicum of due process. The taking of the res is a taking without due process and without compensation which warrants this Court's intervention.

CONCLUSION

Certiorari should be granted as to Question Number 1 to resolve a split between seven circuits - four on one side of the issue and three on the other - as well as to resolve the confusion in yet an eighth circuit that goes both ways.

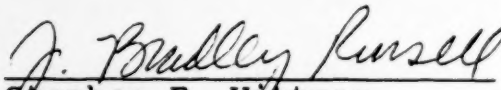
Certiorari should be granted as to Question Number 2 because the Ninth Circuit has adopted a jurisdictional rule at odds with this Court's decision in The Rio Grande, and because the Ninth Circuit Rule is inconsistent with the rule being followed in six other circuit courts of appeal and in direct conflict with the Eighth Circuit's decision in $12,390. Certiorari should be granted as to Question Number 3 to settle the important constitutional question relating to the continued viability and constitutionality

of forfeitures and the "archaic" in rem procedures used to carry them out. A grant of Certiorari to correct the arbitrary treatment the Tangonan's received would also be proper under the supervisory authority of this Court.

Petitioners started this argument with a quotation from Judge Learned Hand: "thou shall not ration justice." Both district and circuit courts have rationed justice to the Tangonans and denied them any meaningful hearing. The final decision on whether justice will be rationed, rests with this Court.

For the foregoing reasons, the Tangonans ask the Justices of the Supreme Court of the United States to grant Certiorari, review their case and give them their day in court.

Respectfully Submitted,



Stephen E. Wittman
Michael P. Fedynyshyn
J. Bradley Russell*

* Counsel of Record
WITTMAN, FEDYNYSHYN & ROBERTS
101 West Broadway, Suite 510
San Diego, California 92101
(619) 233-8846

CERTIFICATE OF SERVICE

I, James Bradley Russell, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the enclosed Petition for Certiorari upon the Honorable Kenneth W. Starr, Solicitor General of the United States, and upon the Honorable William Braniff, U. S. Attorney for the Southern District of California, by causing said copies thereof to be placed in a United States mailbox, first-class postage prepaid, this 15th day of May, 1992, addressed as follows:

Honorable Kenneth W. Starr
Solicitor General of the United States
Department of Justice
Tenth & Constitution Avenue
Washington, D.C. 20530

Honorable William Braniff
United States Attorney
940 Front Street, Room 5-N-19
San Diego, CA 92189-0150

James Bradley Russell

SUPREME COURT OF THE UNITED STATES

Statement setting forth the details of filing by depositing in the United States mail with first-class postage prepaid Petition for Certiorari.

I, James Bradley Russell, a member of the Bar of the United States Supreme Court, hereby make this statement in accordance with Rule 29.2 of the Rules of the United States Supreme Court.

I do hereby state and certify that the foregoing Petition for Writ of Certiorari in No._____, Cesar and Rosario Tangonan v. United States of America, is being filed pursuant to Rule 29 of the Rules of the United States Supreme Court, by depositing forty (40) copies in the United States mail, first-class postage prepaid, and addressed to:

Honorable William K. Suter, Clerk
United States Supreme Court
1 1st Street, NE
Washington, D.C. 20543

on the 15th day of May, 1992.

James Bradley Russell

STATE OF CALIFORNIA,

COUNTY OF SAN DIEGO, to-wit:

I, Michele D. Reilly,

a Notary Public for the aforesaid State and County, do hereby certify that James Bradley Russell, whose name is signed to the foregoing document, dated the 15th day of May, 1992, has acknowledged the same before me on this 15th day of May, 1992.

My commission expires March 12, 1993

NOTARY PUBLIC

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

CESAR AND ROSARIO TANGONAN,

Claimant-Petitioners,

v.

UNITED STATES OF AMERICA,

Plaintiff-Respondent.

APPENDIX

Opinions of the District Court,
Southern District of California

A. Stipulation Staying Arrest of Defendant Real Property and Judge Thompson's Order thereon filed March 29, 1989

B. Judge Thompson's Order of May 10, 1989 denying Motions for Summary Judgment; Expungement of Lis Pendens; and Sanctions

C. Stipulation for Substitution of the Res and Judge Thompson's Order thereon dated June 20, 1990

D. Judge Thompson's June 5, 1991, Order (1) Granting in Part and Denying in Part Claimants' Motion for Reconsideration of July 12, 1990 Memorandum Decision and Order; and (2) Granting Plaintiff's Motion for Summary Judgment and for Judgment of Forfeiture

E. Memorandum Decision and Judge Thompson's Order dated July 11, 1990

Opinions of the United States Court of Appeal for the Ninth Circuit

F. Order filed March 17, 1992

APPENDIX A

STIPULATION STAYING ARREST
OF DEFENDANT REAL PROPERTY
AND JUDGE THOMPSON'S ORDER
THEREON FILED MARCH 29, 1989

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	Civil No. 88-1241-GT(M)
v.	
ONE RESIDENTIAL PROPERTY LOCATED AT 12388 AVENIDA CONSENTIDO, RANCHO BERNARDO, CALIFORNIA AND ALL APPURTENANCES AFFIXED THERETO,	
Defendants.	

STIPULATION STAYING ARREST
OF DEFENDANT REAL PROPERTY
AND JUDGE THOMPSON'S ORDER
THEREON FILED MARCH 29, 1989

COMES NOW, Claimants, Cesar and Rosario Tangonan (the "Tangonans"), by and through their attorneys of record Wittman and Wittman, by Steven J. Roberts, and plaintiff, the United States of America, by and through its attorneys of record, the United states Attorneys Office, by Mary Lundberg, and hereby

stipulate as follows:

1. Plaintiff, the United States of America, filed its complaint for forfeiture of the defendant real property on August 22, 1988;

2. The Tangonans have filed a Claim (Fed.R.Civ.P.Supp. Rule C(6)) along with Motions for: Summary Judgment; Expungement of Lis Pendens; and Sanctions. A hearing on the Tangonans' Motions are scheduled for April 24, 1989 at 10:30 a.m. in Courtroom One of this Court;

3. The parties hereto agree to stay the arrest of defendant real property pending the outcome of the hearing on April 24, 1989;

4. The undersigned represent that they have the authority of their respective clients to enter into this

stipulation;

5. This stipulation is without prejudice to either parties rights in this action.

ORDER

The Court, having considered the stipulation of the parties and finds good cause exists, hereby stays arrest of the defendant property pending the outcome of the hearing on the Tangonans' Motions for: Summary Judgment; Expungement of Lis Pendens; and Sanctions, scheduled to be heard on April 24, 1989, at 10:30 a.m. in Courtroom One of this Court.

Dated: /s/ March 29, 1989

/s/ Gordon Thompson
GORDON THOMPSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

APPENDIX B

JUDGE THOMPSON'S ORDER OF

MAY 10, 1989 DENYING MOTIONS

FOR SUMMARY JUDGMENT; EXPUNGEMENT OF

LIS PENDENS; AND SANCTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	Civil No. 88-1241-GT(M)
v.	
ONE RESIDENTIAL PROPERTY LOCATED AT 12388 AVENIDA CONSENTIDO, RANCHO BERNARDO, CALIFORNIA AND ALL APPURTENANCES AFFIXED THERETO,	
Defendants.	

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT; EXPUNGEMENT OF LIS PENDENS; AND SANCTIONS

Claimants Cesar and Rosario Tangonan's Motions for Summary Judgment, Expungement of Lis Pendens, and Sanctions came on regularly for hearing on April 24, 1989, at 10:30 a.m. before the Honorable Gordon Thompson, Jr., Chief Judge of the United States District Court for the Southern District of California. Cesar and Rosario Tangonan appeared by

and through their attorneys of record, Wittman and Wittman, by Sandra J. Wittman and Steven J. Roberts. The United States appeared by and through its counsel, William Braniff, United States Attorney, by John A. Houston and Mary C. Lundberg, Assistant United States Attorneys.

The court, having reviewed the record and the pleadings and considered the presentation of counsel, and good cause appearing,

IT IS HEREBY ORDERED that

Cesar and Rosario Tangonan's Motions for Summary Judgment, Expungement of Lis Pendens, and Sanctions are denied.

Dated /s/ May 10, 1989

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR., Judge
United States District Court

APPENDIX C

STIPULATION FOR SUBSTITUTION OF THE RES AND JUDGE THOMPSON'S ORDER THEREON DATED JUNE 20, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ONE RESIDENTIAL PROPERTY LOCATED AT 12388 AVENIDA CONSENTIDO, RANCHO BERNARDO, CALIFORNIA AND ALL APPURTENANCES AFFIXED THERETO, Defendants.	Civil No. 88-1241-GT(M)

STIPULATION FOR SUBSTITUTION
OF THE RES AND ORDER THEREON

The United States of America ("plaintiff"), by and through its counsel, William Braniff, United States Attorney, and Mary C. Lundberg, Assistant United States Attorney, and Cesar and Rosario Tangonan ("claimants"), and their attorneys of record, Wittman and Wittman, by Michael Fedynyshyn, stipulate and agree as follows:

1. On or about August 22, 1988, plaintiff filed a complaint for forfeiture against the defendant property.

2. On or about September 27, 1988, pursuant to an escrow agreement, the defendant property was purchased by claimants.

3. On or about September 27, 1988, a total of $137,000.00, representing the approximate net proceeds of the sale of the defendant property, was paid out of escrow to Elvia Soto. Elvia Soto was the titleholder of record on the defendant property pursuant to a quitclaim deed recorded August 25, 1988.

4. On or about May 24, 1989, pursuant to a warrant for arrest in rem, the United States Marshals Service duly arrested the defendant property.

5. Claimants have proposed and plaintiff hereby agrees to substitute $137,000.00 in cash for the defendant property in this lawsuit.

6. Claimants will deposit the $137,000.00 substitute res with the United States Marshals Service. The substitute res will be placed in the United States Marshals Services Seized Assets Account.

7. Upon claimants' deposit of the $137,000.00 substitute res with the United States Marshals Service, plaintiff will withdraw and remove the Lis Pendens on the defendant property which was recorded February 10, 1989.

8. Claimants and plaintiff reserves all rights against the $137,000.00 substitute res as if it were the defendant property, including the right

to petition the Attorney General of the United States for remission and/or mitigation of forfeiture.

9. If plaintiff prevails in this case, the $137,000.00 substitute res shall be condemned and forfeited to the United States.

10. If the claimants prevail in this case, they shall receive the $137,000.00 substitute res plus interest at the federal statutory rate from the date of deposit.

12. If a settlement is reached whereby a portion of the $137,000.00 substitute res is returned to the claimants, claimants shall receive interest upon the amount returned at the federal statutory rate.

O R D E R

IT IS SO ORDERED.

/s/ Jun 20 1989

/s/ Gordon Thompson, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

MEMORANDUM DECISION AND

JUDGE THOMPSON'S ORDER

DATED JULY 11, 1990

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	Civil No. 88-1241-GT(M)
v.	
ONE RESIDENTIAL PROPERTY LOCATED AT 12388 AVENIDA CONSENTIDO, RANCHO BERNARDO, CALIFORNIA AND ALL APPURTENANCES AFFIXED THERETO,	
Defendants.	

MEMORANDUM DECISION AND ORDER

On April 23, 1990, plaintiff United States of America's motion for summary adjudication of issues came on for hearing before the Honorable Gordon Thompson, Jr., United States District Judge. Assistant United States Attorney Mary C. Lundberg appeared on behalf of the United States. Stephen J. Roberts, Esq. appeared on behalf of claimants Cesar Tangonan, Rosario Tangonan, and

World Savings & Loan. At the time of the hearing, the court granted the motion and requested that the prevailing party prepare an order reflecting the court's ruling. Since the order submitted by the Government on June 18, 1990 does not fully reflect the court's reasoning, the court issues the following Memorandum Decision and Order.

BACKGROUND

The Government has brought this civil forfeiture action against a residential property which claimants Cesar and Rosario Tangonan purchased from an alleged nominee owner for the Contreras-Subias drug organization. On July 11, 1988, Elvia Felix-Soto signed a deed granting the property at 12388 Avenida Consentido in Rancho Bernardo, California to the Tangonans. Soto is an alleged

associate of the José Contreras-Subias narcotics trafficking organization. On August 22, 1988, the Government initiated forfeiture proceedings against the property by filing a forfeiture complaint and recording at the San Diego County Recorder's Office a lis pendens on the property.

Meanwhile, on September 27, 1988, closing occurred on the Tangonans' purchase: Fidelity National Title Insurance Company caused the Soto to Tangonan grant deed to be recorded, claimant World Savings and Loan recorded their deed of trust, and the property came out of escrow. On January 12, 1989, the Government, in error, recorded a withdrawal of its original lis pendens. Recognizing the mistake, it recorded a second lis pendens on February 10, 1989.

During the course of the proceedings in this case, the claimants have substituted $137,000 in cash as the defendant res.

The instant motion for summary adjudication involves the following three issues: (1) Whether, assuming the Government can show probable cause to believe that the Contreras-Subias organization purchased the property with narcotics proceeds, title vested in the Government at the time of that purchase; (2) whether the Tangonans can assert the innocent owner defense because they lacked knowledge of the property's drug-related past when they in turn purchased it; and (3) whether the Tangonans were bona fide purchasers for value due to the Government's lis pendens which was recorded prior to closing.

DISCUSSION

A. Vesting of Title: The Relation-Back Doctrine

Pursuant to the relation-back doctrine, the Government's title in forfeited property is deemed to vest at the time of the illegal act which gave rise to the forfeiture. See 21 U.S.C. §881(h); United States v. Stowell, 133 U.S. 1 (1989); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 633, 685 (1974); Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989). Thus, assuming that the Government can show at a later time that the Contreras-Subias organization purchased the property with drug proceeds, title would be deemed to vest in the Government at the time of that

transaction. Accordingly, summary adjudication of the first issue identified by the Government is appropriate.

The claimants, of course, do not dispute this issue of law. Rather, they argue that their interest in the property is protected from forfeiture pursuant to the innocent owner defense.

B. Availability of the Innocent Owner Defense

The Government also seeks a ruling that the innocent owner defense is not available to the claimants in this case. The claimants make a persuasive argument that the relation-back doctrine cannot prevent a subsequent bona fide purchaser for value from invoking the innocent owner defense, i.e. that property cannot be forfeited from an innocent purchaser

who had no knowledge, either actual or constructive, of a previous illegal transaction which would subject the property to forfeiture.

Even if the claimants are correct in asserting that an innocent owner defense should be available to bona fide purchasers for value, however, it is not available to them under circumstances of this case because the court finds that they are not bona fide purchasers. Accordingly, the court need not reach, and does not reach, the issue of whether the relation-back doctrine prevents a subsequent purchaser from invoking the innocent owner defense.

C. Bona Fide Purchasers

The court finds that the Tangonans are not bona fide purchasers because the Government recorded a lis pendens prior to the closing of escrow, giving them

constructive notice of the pending forfeiture action against the property. That Fidelity Title apparently failed to discover the lis pendens on the records at the County Recorder's Office does not mean that the Government should be forced to give up its legitimate interest in the property.

The claimants have raised a number of technical objections as to the adequacy of the lis pendens recorded by the Government. The court rejected these same objections as meritless in ruling upon the claimants' motion for summary judgment one year ago.

1. Notice By Ordinary Mail

The claimants first argue that the recordation of the lis pendens on August 22, 1988 was void because the Government did not comply with the requirement that

it send notice to the owner of record--the alleged Contreras-Subias associate, Soto--by certified mail. See Cal. Civ. Proc. Code § 409(d). Instead, the Government served its notice on Soto by ordinary mail.

The Government's failure to strictly comply with this technical requirement might create some doubt as to the adequacy of the lis pendens as to Soto, but it is irrelevant as to the Tangonans. California Code of Civil Procedure § 409(a) provides that subsequent purchasers, such as the Tangonans, are deemed to have constructive notice of the pendency of an action by the filing of the lis pendens and nothing more. See Cal. Civ. Proc. Code § 409(a). In other words, once the Government filed its lis pendens, the Tangonans were on notice,

regardless of the Government's failure to send notice to Soto by the correct type of mail. The Tangonans simply lack standing to raise any deficiencies in the notice as to Soto.

2. Alleged Failure to Serve the Tangonans

The Tangonans further argue that they lacked constructive knowledge of the pending forfeiture action because the Government did not serve them with notice of the lis pendens when they became parties to the forfeiture action, as required by California Code of Civil Procedure § 409(c). This argument also fails because the Tangonans clearly had actual knowledge of the lis pendens at the time they filed their claims and became parties in the case. That the Government did not send the Tangonans

notice of the lis pendens certainly does not show that they lacked actual notice.

3. Subsequent Withdrawal & Replacement of the Lis Pendens

Finally, the claimants argue that the Government's withdrawal of its lis pendens in January, 1989--approximately four months after closing--operates to retroactively exonerate them from their failure to discover the lis pendens during escrow. They cite to California Code of Civil Procedure § 409.55 in support of their contention. Section 409.55 does not apply to the claimant, however, because it is only prospective in effect. It provides that "upon recordation of the notice of withdrawal" the lis pendens will not constitute constructive notice only as to "any person thereafter dealing with property."

Cal. Civ. Proc. Code § 409.55. The Tangonans had already been dealing with the property prior to the temporary withdrawal of the Government's lis pendens. Therefore, the withdrawal is irrelevant as to whether the Tangonans had constructive notice.

CONCLUSION

Accordingly, the court hereby grants summary adjudication in favor of the Government as to the issue of whether title vested in the United States when the prior owner allegedly purchased the property with the proceeds of narcotics transactions, and as to the issue of whether the claimants are bona fide purchasers for value. The court does not reach the issue of whether the relation-back doctrine prevents a subsequent

innocent purchaser from asserting the innocent owner defense.

IT IS SO ORDERED.

Dated: /s/ July 11, 1990

/s/ Gordon Thompson, Jr.
GORDON THOMPSON, JR.
United States District Judge

APPENDIX E

JUDGE THOMPSON'S JUNE 5, 1991, ORDER (1) GRANTING IN PART AND DENYING IN PART CLAIMANTS' MOTION FOR RECONSIDERATION OF JULY 12, 1990 MEMORANDUM DECISION AND ORDER; AND (2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FOR JUDGMENT FOR FORFEITURE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	
Plaintiff,	Civil No. 88-1241-GT(M)
v.	
ONE RESIDENTIAL PROPERTY LOCATED AT 12388 AVENIDA CONSENTIDO, RANCHO BERNARDO, CALIFORNIA AND ALL APPURTENANCES AFFIXED THERETO,	
Defendants.	

ORDER (1) GRANTING IN PART AND DENYING IN PART CLAIMANTS' MOTION FOR RECONSIDERATION OF JULY 12, 1990 MEMORANDUM DECISION AND ORDER; AND (2) GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND FOR JUDGMENT FOR FORFEITURE

The motion of Cesar and Rosario Tangonan and World Savings and Loan Association ("claimants") for reconsideration of this Court's July 11, 1990 Memorandum Decision and Order, which order granted the United States of

America's ("plaintiff's") motion for partial summary judgment and plaintiff's current motion for summary judgment and for judgment of forfeiture, all came on regularly for hearing on April 29, 1991 at 10:30 a.m. before the Honorable Gordon Thompson, Jr., United States District Court Judge. Plaintiff appeared by and through its counsel, William Braniff, United States Attorney, and Mary C. Lundberg, Assistant United States Attorney. Claimants appeared by and through their attorneys of record, Wittman and Fedynyshyn, by J. Bradley Russell. Based on the files and records in this case, the pleadings filed in support and opposition to these motions, and the presentation of counsel and good cause appearing,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that:

1. Claimants' request to correct the clerical error found in this Court's July 11, 1990 Memorandum Decision and Order is granted. On page 2, line 5 of the Court's Memorandum Decision and Order, the date July 11, 1988 will be replaced with the date July 31, 1988, which date accurately reflects the date Elvia Felix Soto signed a deed granting the property at 12388 Avenida Consentido, Rancho Bernardo, California to the Tangonans.

2. Claimants' motion for reconsideration of this Court's July 11, 1990 Order granting plaintiff's Motion for Summary Adjudication of Certain Legal Issues is denied. The Court is not persuaded by U.S.A. v. One Parcel of Real

Estate, 715 F. Supp. 360 (S.D. Fla. 1989) and confirms its previous holding that the Tangonans were not bona fide purchasers of value of the defendant property as they were on notice of the government's of Lis Pendens. Plaintiff's Notice of Lis Pendens was properly filed in the San Diego County Recorder's Office over one month prior to the close of escrow on the sale of the defendant property from Elvia Felix Soto to the Tangonans.

3. Plaintiff's motion for summary judgment on the issue of whether there is probable cause to believe that the defendant property was purchased with the proceeds of or proceeds traceable to narcotics trafficking is granted. Plaintiff has met its burden of showing probable cause to believe that the defendant property was purchased with the

proceeds of or proceeds traceable to the narcotics trafficking activities of Jose Contreras-Subias and his drug trafficking organization.

4. Judgment of forfeiture is entered in favor of plaintiff, the United States of America, and the defendant property, which now consists of $137,000.00 in U.S. currency which was substituted for the defendant real property by this Court's previous Order, shall be and hereby is condemned and forfeited to the United States.

5. Costs incurred by the United States Marshals Service, the Drug Enforcement Administration and any other government agencies shall be the first

charge against the forfeited $137,000.00 in U.S. currency.

Dated: /s/ 6-5-91

/s/ Gordon Thompson, Jr.
Gordon Thompson, Jr., Judge
United States District Court

APPENDIX F

ORDER FILED MARCH 17, 1992

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No.91-56491
Plaintiff, Appellee,	)	DC# CV-88-1242-GT
vs.	)	Southern California
CESAR TANGONAN, et al.,	)	
Claimants-Appellants,	)	
and	)	
ONE RESIDENTIAL PROPERTY LOCATED AT 12388 AVENIDA CONSENTIDO, RANCHO BERNARDO, CALIFORNIA,	)	ORDER
Defendant.	)	

Before: BROWNING, POOLE and WIGGINS, Circuit Judges

Appellants' motion to strike appellee's motion to dismiss the appeal is denied. Moreover, because appellants have failed to demonstrate that any errors in the transfer of the res in this case "reasonably prevented [them] from applying for a stay," appellee's motion

to dismiss this appeal as moot is granted. U.S. v. $29,959 in U.S. Currency, 931 F. 2d 549, 552 (9th Cir. 1991).

Supreme Court, U.S.
FILED
JUL 20 1992
OFFICE OF THE CLERK

(2)

No. 91-1884

In the Supreme Court of the United States

OCTOBER TERM, 1992

CESAR TANGONAN AND
ROSARIO TANGONAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the court's jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1884

CESAR TANGONAN AND
ROSARIO TANGONAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F1-F2) and the opinions of the district court (Pet. App. A1-A3, B1-B2, C1-C5, D1-D3, E1-E6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1992. The petition for a writ of certiorari was filed on May 18, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATE

1. On July 31, 1988, Elvia
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dant *res*. Pet. App. C1-C5.

2. By order dated July 11,
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Department of Justice Asset
United States Treasury. Pet

IENT

Felix-Soto, an alleged asso-
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to a residential property
Consentido, in Rancho
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of drug trafficking. At the
filed a lis pendens on the
County Recorder's Office.
oners closed their transac-
ners' deed from Felix-Soto
received $137,000, the net
p. C2, D2-D3, E3. On June
ed $137,000 for the defen-

1990, the district court held
a fide purchasers for value.
vernment's filing of the lis
e petitioners constructive
re action against the prop-
June 5, 1991, the district
nt's motion for summary
The court held that the gov-
showing that the property
traceable to drug traffick-
rdingly, the court ordered
United States. *Id.* at E5.
appeal, but they failed to
tain a supersedeas bond to
's order. On June 24, 1991,
ransferred the *res* to the
Forfeiture Account of the
7.

3. The government moved to dismiss the appeal on the ground that the departure of the *res* deprived the court of jurisdiction. On March 13, 1992, petitioners filed a motion in the court of appeals seeking a stay of execution. On March 17, the court of appeals granted the government's motion to dismiss. Pet. App. F1-F2. The court of appeals held that petitioners "have failed to demonstrate that any errors in the transfer of the *res* in this case 'reasonably prevented [them] from applying for a stay.'" Pet. App. F1 (quoting *United States* v. *$29,959 U.S. Currency*, 931 F.2d 549, 552 (9th Cir. 1991)).

ARGUMENT

Petitioners contend (Pet. 9-35) that the court of appeals erred in dismissing their appeal from the district court's order forfeiting their funds to the government. As petitioners point out (Pet. 9-11), there is a conflict in the courts of appeals over whether, in an *in rem* forfeiture proceeding, the removal of the *res* from the geographic jurisdiction of the court deprives the court of jurisdiction.[1]

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[1] In addition to the court of appeals in this case, the Seventh and Eleventh Circuits adhere to the view that the presence of the *res* is a prerequisite to *in rem* jurisdiction. See *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988). In a recent unpublished decision, the Sixth Circuit agreed with the Seventh, Ninth, and Eleventh Circuits. See *United States* v. *A 1985 Cadillac Fleetwood*, No. 91-3388 (6th Cir. Sept. 12, 1991), petition for cert. pending *sub nom. Price* v. *United States*, No. 91-1141 (filed Jan. 10, 1992). The Fifth Circuit also appears to adhere to that rule. See *United States* v. *$79,000 in U.S. Currency*, 801 F.2d 738, 739 (1986). On the other hand, four courts of appeals take the view that even after the departure of the *res* from the jurisdiction of the court, the court retains jurisdiction over the government and thus may order the government to return forfeited funds. See *United States* v. *$12,390*, 956 F.2d 801 (8th Cir. 1992); *United States* v. *One Lot of*

On February 24, 1992, this Court granted the petition for a writ of certiorari in *Republic National Bank* v. *United States*, 112 S. Ct. 1159. That case presents the question whether the removal of the *res* from the district in an *in rem* forfeiture proceeding deprives the court of appeals of jurisdiction. In *Republic National Bank*, the government filed an *in rem* action under 21 U.S.C. 881 seeking the forfeiture of a single-family residence. While the case was pending in the district court, the house was sold and the proceeds were deposited with the United States Marshal. Following a bench trial, the district court issued a final judgment of forfeiture. The claimant appealed, but failed to file a supersedeas bond or seek a stay of the district court's judgment. The United States Marshal then transferred the proceeds of the sale of the house into the Assets Forfeiture Fund of the United States Treasury. Because the *res* had left the court's jurisdiction, the court of appeals dismissed the appeal.

In this case, as in *Republic National Bank*, the court of appeals dismissed the claimants' appeal because the *res* had left the jurisdiction of the district court. We therefore suggest that the Court hold the petition for a writ of certiorari in this case pending its decision in *Republic National Bank*.[2]

$25,721.00 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *Aiello*, 912 F.2d 4, 7 (2d Cir. 1990) (holding that the court had jurisdiction but ruling for the government on the merits), cert. denied, 111 S. Ct. 757 (1991); *United States* v. *$95,945.18, United States Currency*, 913 F.2d 1106, 1109 (4th Cir. 1990). See also *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money).

[2] Petitioners contend (Pet. 22-24) that the court of appeals erred in dismissing their appeal because the United States removed the *res* from the jurisdiction of the district court before the expiration of the automatic ten-day stay of execution provided by

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Republic National Bank* v. *United States*, cert. granted, 112 S. Ct. 1159 (1992), and then disposed of in light of the decision in that case.

Respectfully submitted.

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Assistant Attorney General

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Attorney

JULY 1992

Federal Rule of Civil Procedure 62(a). Although petitioners are correct that the Marshal removed the *res* from the district within ten days of entry of the judgment, petitioners took no action to stay the execution of the judgment within ten days. Consequently, they were not prejudiced by the Marshal's action. See *United States* v. *$29,959 U.S. Currency*, 931 F.2d 549, 552 (9th Cir. 1991).